INDEX

CASES CITED

STATUTES

DEPARTMENT OF AGRICULTURE REGULATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 255

OSCAR THORNTON, SHABIE THORNTON, INMAN THORNTON, WESLEY MCDONALD, WAVERLY MCDONALD AND TINKER CARROLL, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals was filed on November 5, 1924, and is reported in 2 F. (2nd) 561. It appears in the transcript of record, pages 64 to 65.

JURISDICTION

The petitioners, with sixteen others, were tried in the United States District Court for the Southern District of Georgia on an indictment containing two counts, in which they were charged with

conspiracy to violate Section 62 of the Criminal Code. (R. 1–5.) A verdict finding the petitioners guilty was returned on March 12, 1924. (R. 11.) Judgment and sentence of imprisonment for six months were entered on March 13, 1924. (R. 12.) The Circuit Court of Appeals rendered a judgment dated November 5, 1924, affirming the judgment of the District Court. (R. 65.) A writ of certiorari was granted by this Court by order filed March 9, 1925 (R. 66), under Section 240 of the Judicial Code (since amended by the Act of February 13, 1925).

STATEMENT OF FACTS

The principal questions involved in the case are (1) whether any Federal statute authorizes employees of the Bureau of Animal Industry of the United States Department of Agriculture to supervise the dipping of cattle within a State in order to prevent the spread of splenetic fever among cattle, and, (2) whether, if any statute does confer such authority, it is constitutional. The petitioners also raise certain questions as to the form of the indictment and as to the propriety of certain instructions to the jury.

Twenty-two defendants, including the six petitioners, were indicted in the District Court of the United States for the Southern District of Georgia under an indictment the first count of which alleged in substance that the defendants on the 10th day of July, 1920, and continuously thereafter up

to the finding of the indictment, did, in Echols County, Georgia, within the Southern District of Georgia, conspire, etc., to use deadly and dangerous weapons for the purpose of deterring and preventing certain named employees of the Bureau of Animal Industry of the United States Department of Agriculture from discharging their duties as such employees,

> which said employees were then and there charged with the duty of supervising the dipping of, and causing to be dipped, cattle, to wit; cows, bulls, yearlings, calves, and oxen, in order to prevent the spread of splenetic fever among cattle, and in order to eradicate and remove from tick-infested animals what is commonly known as the cattle fever tick.

The indictment described the weapons used and the manner of their use, and alleged that it was known to the defendants that the employees of the Bureau of Animal Industry named in the indictment were such employees and were engaged in the performance and execution of their duties as such. The first count charged four overt acts, all committed with deadly and dangerous weapons. (R. 1–4.)

The second count of the indictment alleged in substance that the defendants on or about the 1st day of July, 1920, and continuously thereafter up to the finding of the indictment, did, in Echols County, Georgia, within the Southern District of Georgia, conspire, etc., to forcibly impede and in-

terfere with the named employees of the Bureau of Animal Industry in the execution of their duties,

> said employees being then and there engaged under the Bureau aforesaid, in supervising and causing the dipping of cows, bulls, calves, and yearlings for the purpose of preventing the spread of splenetic fever and for the purpose of eradicating from said cattle what is commonly known as the cattle fever tick

by dynamiting and burning cattle dipping vats and cattle spray pens. It alleged that the defendants knew that the employees of the Bureau of Animal Industry named in the indictment were such employees and engaged in the discharge of their duties as such, and that their duties required the use of dipping vats and spray pens. The second count charged two overt acts, each involving the destruction of dipping vats or spray pens. (R. 4–5.)

The defendants demurred to the indictment. (R. 5–11.) After hearing argument the court overruled the demurrer (R. 11) and the case proceeded to trial.

It appears from the evidence that on June 17, 1915, an agreement was entered into between the State Veterinarian of the Georgia Department of Agriculture and the Bureau of Animal Industry of the United States Department of Agriculture, "regarding eradication of the cattle tick in the State of Georgia by cooperation," which provided, in substance, that the work of tick eradication should be cooperative in every particular; that the

Bureau of Animal Industry should detail a competent veterinary inspector to direct the tick eradication work and additional veterinary inspectors and agents in tick eradication to the extent of the means at hand and in proportion to the funds expended by the State for the employment of inspectors; and that the State veterinarian should employ competent State inspectors to the extent of the means at hand, should enforce State regulations governing the movement of cattle within the State similar to the regulations of the United States Department of Agriculture governing the interstate movement of cattle from the quarantined area, and should enforce measures authorized by law looking to the protection of tick eradication areas against the introduction of infection from without, and quarantine and prohibit the intracounty movement of infected cattle within the eradication areas except under conditions mutually agreed upon between the State and Federal authorities. (R. 38–40.)

S. J. Horne testified that he was employed by the United States Department of Agriculture as inspector in charge of tick eradication in Georgia and Florida, and was put in charge of the State of Georgia in September, 1921. (R. 14.) Prior to this time Echols County had been determined by Doctor Horne's predecessor to be a tick infested area and had been quarantined against interstate movements of cattle. (R. 16.) In the spring of 1922 the construction of vats for use in dipping cat-

tle to eradicate ticks was commenced, and there was evidently a great deal of opposition to the proposed tick eradication work, for as fast as vats were built they were dynamited. (R. 14–15.) From September until July, 1922, from 50 to 75 vats were destroyed. (R. 15.)

Doctor Horne sent first Doctor Applewhite, and later Mr. Jeter into Echols County. (R. 14–15.) In August, 1922, he took into Echols County all of the employees of the Bureau of Animal Industry named in the indictment except two. (R. 16.) He testified as to the work done by the employees of the Bureau of Animal Industry, and the purpose of sending them into Echols County, as follows (R. 15):

> They were instructed to visit the people. They were under my supervision, and I work under the supervision of the chief of the Bureau of Animal Industry in Washington. The first thing they were to do was to get the vats located and advise the people what was necessary to accomplish tick eradication, the dipping of cattle every fourteen days, under supervision, and for the employment and appointment of local men through the board of commissioners. By the words under supervision, I mean that the cattle shall be disinfected under the men directing the work. The actual work of dipping the cattle is accomplished by county and state inspectors, under the supervision of government inspectors. The Government men are not present at every

dipping, but they are present at all they can get to. The purpose in having Government men present is to gain knowledge of what has been accomplished, so that the counties or areas doing systematic work can be released from quarantine. The Government men also supervise the mixing of the liquid; it is their duty to see that the vats are properly charged with an arsenical preparation approved by the Government. The purpose of dipping cattle is to eradicate ticks. Ticks are a parasite that transmits a disease known as splenetic or Texas fever. An investigation was made because of the fact that cattle movements from the southern states to the northern markets invariably brought on a disease among cattle in those states that they did not have except immediately following these cattle movements from the south. This investigation by the Bureau of Animal Industry disclosed that the tick was the cause, and at that time a quarantine was placed over all the territory where ticks lived,—a Federal quarantine prohibiting the movement of cattle from the infected area into a free area.

As cattle were dipped they were marked with paint, in order to distinguish between the cattle which had been dipped and those which had not. (R. 16, 20.) The employees of the Bureau of Animal Industry named in the indictment were also given State commissions, under the cooperative agreement of June 17, 1915. (R. 20.) Their duties included supervising the dipping of cattle,

riding the range to see whether cattle had been dipped, seizing and impounding cattle which had not been dipped, serving on owners of cattle notices requiring that they be dipped, and guarding dipping vats. (R. 16, 18, 19, 21, 25, 37.) The employees of the Bureau of Animal Industry established a camp, called McKinnon Camp, where the men lived in tents. (R. 19.)

The opposition to the work being carried on by the State and county employees and the employees of the Bureau of Animal Industry resulted in the commission of a number of acts of violence. The indictment alleges (R. 2–5) that in furtherance of the conspiracy therein alleged and in order to effect the objects thereof, the conspirators shot at the employees of the Bureau of Animal Industry in camp for the night at Camp McKinnon; shot Max C. Lochridge and Roy S. Ritchey, employees of the Bureau of Animal Industry, murdering Lochridge and wounding Ritchey; assaulted and beat W. D. Counts, an employee of the Bureau of Animal Industry; shot at John Lofton, jr., and Frank Peterson, employees of the Bureau of Animal Industry, while they were guarding a dipping vat known as the Prime Vat (Lofton and Peterson were not, as a matter of fact, Federal employees, R. 35, 43); and blew up with dynamite and other high explosives fifteen dipping vats and burned four spray pens.

It is not necessary to consider in detail the evidence concerning the commission of the overt acts because, as stated by the Circuit Court of Appeals (R. 64), " it is not denied that there was sufficient proof of some of them."

THE GEORGIA STATUTES

The State of Georgia, by an Act approved August 16, 1909 (Georgia Laws, 1909, Pt. I, Title 6, p. 131), empowered the Commissioner of Agriculture to establish, maintain, and enforce quarantine lines and to make such rules and regulations as he deemed necessary to carry into effect the provisions of the Act. Section 9 of said Act provides (p. 134):

> That the Commissioner of Agriculture may appoint or commission Federal Veterinarian or Livestock Inspector who may be doing work in Georgia, as State Livestock Inspectors; *provided* they act without pay from the State of Georgia.

By an Act approved August 13, 1910 (Georgia Laws, 1910, Pt. I, Title 6, p. 125), the office of State Veterinarian was created. Section 2 of said Act, defining the duties of this officer, provides:

> That the duties of the State Veterinarian shall be to investigate and take proper measures for the control and suppression of all contagious and infectious diseases among the domesticated animals within the State, under such rules and regulations as may be

> promulgated by him and approved by the Commissioner of Agriculture of Georgia; he shall assume charge of the work of cattle-tick eradication in cooperation with the Federal authorities * * *.

An Act approved August 17, 1918 (Georgia Laws, 1918, Pt. I, Title VI, p. 256), known as the State-Wide Tick Eradication Act, provides (p. 257), among other things, in Section 4, that cattle, horses, or mules infected with cattle ticks or exposed to tick infestation shall be dipped regularly every fourteen days "in a vat properly charged with arsenical solution, as recommended by the United States Bureau of Animal Industry."

THE FEDERAL STATUTES

The Bureau of Animal Industry was established by an Act of May 29, 1884, c. 60, 23 Stat. 31. Section 3 of said Act is as follows (p. 32):

> That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases and to certify such rules and regulations to the executive authority of each State and Territory and invite said authorities to cooperate in the execution and enforcement of this Act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuropneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have

> adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State or other properly constituted authorities signify their readiness to cooperate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this Act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this Act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another.

By an Act of February 9, 1889, c. 122, 25 Stat. 659, the Department of Agriculture was made one of the executive departments of the Government, under the supervision and control of a Secretary of Agriculture, and by an Act of July 14, 1890, c. 707, 26 Stat. 282, 288, the Secretary was vested with all the authority which by the Act of May 29, 1884, was conferred upon the Commissioner of Agriculture.

An Act of February 2, 1903, c. 349, 32 Stat. 791, after conferring on the Secretary of Agriculture certain powers with respect to the suppression and extirpation of contagious diseases among domestic animals conferred on the Secretary of the Treasury by the Act of May 29, 1884, provides (p. 792):

> He is hereby authorized and directed, from time to time, to establish such rules

and regulations concerning the exportation and transportation of livestock from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia and to foreign countries, as he may deem necessary, and all such rules and regulations shall have the force of law. Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle or other livestock which were about to be shipped, driven, or transported from such locality to another, as above stated, and had found them free from Texas or splenetic fever infection, pleuropneumonia, foot-and-mouth disease, or any other infectious, contagious, or communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place into and through any State or Territory, including the Indian Territory, and into and through the District of Columbia, or they may be exported from the United States without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purposes of such inspection.

> SEC. 2. That the Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, * * *

An Act of March 3, 1905, c. 1496, 33 Stat. 1264, provides, in Section 1:

> That the Secretary of Agriculture is authorized and directed to quarantine any State or Territory or the District of Columbia, or any portion of any State or Territory or the District of Columbia, when he shall determine the fact that cattle or other livestock in such State or Territory or District of Columbia are affected with any contagious, infectious, or communicable disease * * *.

Section 2 prohibits the transportation, delivery for transportation, or driving on foot—

> * * * from any quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, any cattle or other livestock, except as hereinafter provided.

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Section 3 provides (p. 1265):

> That it shall be the duty of the Secretary of Agriculture, and he is hereby authorized and directed, when the public safety will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle, or other livestock, from a quarantined State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia * * *.

Section 4 permits cattle or other livestock to be moved

> * * * from a quarantined State or Territory or the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia, under and in compliance with the rules and regulations of the Secretary of Agriculture, made and promulgated in pursuance of the provisions of section three of this Act:

but prohibits such movement of cattle or other livestock "in manner or method or under conditions other than those prescribed by the Secretary of Agriculture."

Section 5 was incorporated with unimportant changes in the Criminal Code as Section 62. It appears in the Criminal Code as follows:

> Whoever shall forcibly assault, resist, oppose, prevent, impede, or interfere with any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both; and whoever shall use any deadly or dangerous weapon in resisting any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

The Act of May 11, 1922, c. 185, 42 Stat. 507, 510–512, making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1923, under the heading, "General Expenses, Bureau of Animal Industry," appropriated funds for carrying out the provisions of certain named Acts, including "the Act approved May 29, 1884, establishing a Bureau of Animal Industry," "the Act approved February 2, 1903, to enable the Secretary of Agriculture to more effectually suppress and prevent the spread of contagious and infectious diseases of livestock, and

for other purposes," and "the Act approved March 3, 1905, to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other livestock therefrom, and for other purposes," and "to enable the Secretary of Agriculture to collect and disseminate information concerning livestock, dairy and other animal products; to prepare and disseminate reports on animal industry; to employ and pay from the appropriation herein made as many persons in the city of Washington or elsewhere as he may deem necessary; * * * to purchase and destroy diseased or exposed animals or quarantine the same whenever in his judgment essential to prevent the spread of pleuropneumonia, tuberculosis, or other diseases of animals from one State to another."

Specific amounts were appropriated for "inspection and quarantine work, including all necessary expenses for * * * the inspection of southern cattle" and for "all necessary expenses for the eradication of southern cattle ticks."

THE REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

Various regulations and orders of the Department of Agriculture, relating to the interstate movement of livestock, were put in evidence. (R. 41–42.) These are not printed in the record, but

since they were made under the express authority of the statutes referred to above, they are matters of which the Court may take judicial notice. In *Caha* v. *United States*, 152 U. S. 211, Mr. Justice Brewer, delivering the opinion of the Court, said, on pages 221–222:

> The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of Congress, power is intrusted to either of the principal departments of Government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice.

Under date of June 15, 1916, the Secretary of Agriculture issued certain "Regulations Governing the Interstate Movement of Live Stock," effective on and after July 1, 1916, and designated as B. A. I. Order 245. The introductory paragraph provided:

> Under the authority conferred upon the Secretary of Agriculture by the provisions of the acts of Congress approved May 29, 1884 (23 Stat. 31), February 2, 1903 (32 Stat. 791), and March 3, 1905 (33 Stat. 1264), as amended by the act approved March 4, 1913 (37 Stat. 828, 831), the following regulations are hereby prescribed for the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of live stock which is the subject of interstate commerce.

Section 2 of Regulation 1 provided:

> When the Secretary of Agriculture shall determine the fact that cattle or other live-stock in any State, Territory, or the District of Columbia are affected with any contagious, infectious, or communicable disease for which, in his opinion, a quarantine should be established, notice will be given of that fact. A rule will be issued placing in quarantine any State, Territory, or the District of Columbia, or any portion thereof, in which the disease exists, and this rule will either absolutely forbid the interstate movement of live stock from the quarantined area or will indicate the regulations under which interstate movements may be made.

Regulation 2 was headed, "To Prevent the Spread of Splenetic, Southern, or Texas Fever in Cattle," and a footnote stated:

> A "rule to prevent the spread of splenetic fever in cattle" is in effect throughout the entire year. This rule prescribes the quarantined area in the respective States, and should be considered in connection with these regulations.

Sections 1 and 2 of Regulation 2 provided for interstate shipments of cattle for immediate slaughter. Section 3 provided for the interstate movement of cattle for purposes other than immediate slaughter. It contained the following provisions, among others:

> *Paragraph 1.* Cattle of the quarantined area, or other cattle exposed to or infested with ticks (*Margaropus annulatus*), which have been properly dipped twice with an interval of from 7 to 12 days in a permitted arsenical solution or otherwise treated in a manner approved by the Secretary of Agriculture under the supervision of a bureau inspector and which have been certified by the said inspector to be free of infection from splenetic fever, may be moved interstate for any purpose: *Provided*, that the requirements set forth in paragraph 5 of this section are fully complied with.
>
> *Paragraph 2.* Cattle in areas where tick eradication is being systematically conducted in cooperation with the State authorities, or any cattle presented at a

Section 5, headed " Interstate Movement of Cattle Within the Quarantined Area," and Section 6, headed " Movement of Cattle from Quarantined to Free Area and Shipment Therefrom " were as follows:

> Section 5. Cattle shall not be transported, driven, or moved from the quarantined area of any State, Territory, or the District of Columbia to the quarantined area of any other State, Territory, or the District of Columbia, except in compliance with this regulation and subject to State, Territorial, or the District of Columbia restrictions.
>
> Section 6. Cattle shall not be shipped, transported, trailed, driven, or hauled in private conveyances, from the quarantined area in any State, Territory, or the District of Columbia, to the free area in the same State, Territory, or the District of Columbia, and delivered to a transportation company for transportation to any other State, Territory, or the District of Columbia, except in compliance with this regulation.

Rule 1, Revision 17, " To Prevent the Spread of Splenetic, Southern, or Texas Fever in Cattle " of the Department of Agriculture, effective on and after December 1, 1918, and designated as B. A. I. Order 262, stated:

> The fact has been determined by the Secretary of Agriculture, and notice is hereby given, that the contagious and infectious

disease known as splenetic, southern, or Texas fever exists in cattle * * * in the following-named States and territory, to wit: * * * Georgia * * *.

Now, therefore, I, D. F. Houston, Secretary of Agriculture, under authority conferred by Section 1 of the Act of Congress approved March 3, 1905 (33 Stat. 1264), * * * do hereby continue the quarantine on the areas hereinafter described; and do order by this Rule 1, Revision 17, under the authority and discretion conferred on the Secretary of Agriculture by Section 3 of the said Act of Congress approved March 3, 1905 (33 Stat. 1265), that the interstate movement of cattle from the areas herein quarantined shall be made only in accordance with the regulations of the Secretary of Agriculture for the prevention of the spread of splenetic, southern, or Texas fever in cattle.

There followed a description of the areas quarantined, which included Echols County, Georgia.

Various revisions of Rule 1—"To prevent the Spread of Splenetic, Southern, or Texas Fever in Cattle," known as Revisions 18 to 22, inclusive, continued the quarantine of Echols County until on and after December 31, 1923 (R. 41–42).

The "Regulations Governing the Interstate Movement of Live Stock", designated as B. A. I.

Order 245, were superseded by similar regulations designated as B. A. I. Order 263, effective on and after July 1, 1919, and these in turn were superseded by regulations designated as B. A. I. Order 273, effective on and after July 1, 1921, but the later regulations continued without substantial change the provisions of B. A. I. Order 245 set forth above.

THE QUESTIONS

The questions raised by the petition for certiorari are as follows:

(1) Whether the employees of the Bureau of Animal Industry of the Department of Agriculture, named in the indictment, were legally charged with the duty of supervising the dipping of, and causing to be dipped, cattle, in order to prevent the spread of splenetic fever among cattle, and in order to eradicate and remove from tick-infested animals what is commonly known as the cattle fever tick. The petitioners do not question the employment of the employees of the Bureau of Animal Industry and do not question that they were performing their duties under orders of their superiors in the Bureau of Animal Industry, but they allege that there was no statutory authority for the performance of the duties set forth in the indictment.

(2) Whether the Act of May 29, 1884, c. 60, 23 Stat. 31 (or, presumably, any other statute, although the petitioners have throughout their argument treated

the Act of 1884 as the only statute upon which the authority of the employees of the Bureau of Animal Industry can be based) is constitutional, if, when properly construed, it confers upon the Department of Agriculture authority to employ agents of the Bureau of Animal Industry in supervising the dipping of, and causing to be dipped, cattle not moving or intended to move in interstate commerce.

(3) Whether the indictment was invalid because it failed to allege the acceptance by the State of Georgia of rules and regulations for the suppression of contagious diseases among cattle, prepared by the Secretary of Agriculture, and failed to allege that plans and methods for the suppression and extirpation of said diseases adopted by the State of Georgia had been accepted by the Secretary of Agriculture. The petitioners contend that acceptance by the State of Georgia of rules and regulations prepared by the Secretary of Agriculture, or acceptance by the Secretary of Agriculture of plans and methods adopted by the State of Georgia, was a condition precedent under the Act of May 29, 1884, to the exercise of the powers vested in the Secretary of Agriculture by said Act.

(4) Whether the indictment was defective in that, as the petitioners allege (Petition for certiorari, p. 2),

> it nowhere alleges that the cattle being dipped were the subject matter of interstate commerce, or that said cattle had in any way

under the law become subject to the supervision or control or power of the Secretary of Agriculture.

These questions were raised in the court below by assignments of error challenging the action of the trial court in overruling the demurrer and each count thereof (R. 57–58), the admission in evidence over the defendant's objection of the contract dated June 17, 1915, between the Bureau of Animal Industry and the State Veterinarian of the Georgia Department of Agriculture (R. 58), and certain instructions given by the trial court to the jury (R. 58–60).

ARGUMENT

Summary

I. If the employees of the Bureau of Animal Industry named in the indictment were performing any duty legally imposed upon them pursuant to the Federal statutes, the conspiracy alleged in the indictment and established by the evidence was a conspiracy to violate Section 62 of the Criminal Code, whether or not they were also performing other work beyond the scope of their Federal duties. The conspiracy of which the petitioners were convicted was not directed to preventing the employees of the Bureau of Animal Industry from discharging any particular portion of their work in Echols County; both the conspiracy and the overt acts were clearly intended to deter or prevent

all work in connection with the dipping of cattle in Echols County.

II. Some portion, at least, of the work performed by the employees of the Bureau of Animal Industry was authorized by the Federal statutes. The Secretary of Agriculture, pursuant to authority granted by the Act of March 3, 1905, c. 1496, 33 Stat. 1264, had quarantined Echols County against interstate movements of cattle and had issued regulations permitting interstate movements of cattle from quarantined areas only upon certain conditions, among which were that they should have been dipped under the supervision of an inspector of the Bureau of Animal Industry. The Act of May 11, 1922, c. 185, 42 Stat. 507, had appropriated money for the Department of Agriculture for inspection and quarantine work. The Secretary of Agriculture was therefore authorized to maintain inspectors in quarantined areas, if not for the purpose of compelling dipping of cattle, at least for the purpose of supervising the dipping of cattle by their owners or by State or local authorities, in order that cattle so dipped might, if the owner should so desire, be shipped in interstate commerce without further delay.

III. The power of Congress to regulate commerce includes power to quarantine areas where contagious diseases of cattle exist, to prohibit interstate movements of cattle from such areas, and to au-

formed under valid Federal authority the defendants were properly convicted. The conspiracy of which the petitioners were convicted was not directed to preventing the employees of the Bureau of Animal Industry from discharging any particular portion of their work in Echols County; both the conspiracy and the overt acts were clearly intended to deter or prevent all work in connection with the dipping of cattle in Echols County. The conspiracy and the overt acts were not in resistance to any particular acts involving particular cattle; it does not even appear in the record that any of the petitioners owned or had any interest in a single head of cattle.

It is well settled that Congress may make it a crime to do any act which is intended to, or necessarily does, interfere with an officer or agent of the Federal Government in the performance of his duties as such, and such act is no less a crime against the Federal Government because it may also interfere with other work being performed by the officer or agent which is not within the scope of his Federal functions.

In *Ex parte Yarbrough*, 110 U. S. 651, petitioners were convicted under an indictment which, in substance, alleged that they conspired to intimidate Berry Saunders, a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States, and that in the execution of that conspiracy they beat, bruised, wounded, and otherwise maltreated him. Petition-

ers attacked the constitutionality of the statutes which made such a conspiracy a crime. The Court held the statutes valid, Mr. Justice Miller, writing the opinion of the Court, saying (pp. 659, 661–662):

> It is very true that while Congress at an early day passed criminal laws to punish piracy with death, and for punishing all ordinary offenses against person and property committed within the District of Columbia, and in forts, arsenals, and other places within the exclusive jurisdiction of the United States, it was slow to pass laws protecting officers of the Government from personal injuries inflicted while in discharge of their official duties within the States. This was not for want of power, but because no occasion had arisen which required such legislation, the remedies in the State courts for personal violence having proved sufficient.
>
> * * * * *
>
> Now the day fixed for electing members of Congress has been established by Congress without regard to the time set for election of State officers in each State, and but for the fact that the State legislatures have, for their own accommodation, required State elections to be held at the same time, these elections would be held for Congressmen alone at the time fixed by the act of Congress.
>
> Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if

necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation and the election itself from corruption and fraud?

If this be so, and it is not doubted, are such powers annulled because an election for State officers is held at the same time and place? Is it any less important that the election of Members of Congress should be the free choice of all the electors because State officers are to be elected at the same time? *Ex parte Siebold*, 100 U. S. 371.

These questions answer themselves; and it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted.

In *In re Coy*, 127 U. S. 731, defendants were convicted under an indictment which alleged, in substance, that whereas by the law of the State of Indiana it was the duty of inspectors of election to take certified lists of the voters, with the returns of the judges of election, and safely keep them until they delivered them to the county clerk or to the board of canvassers who were to examine and count

the votes of all the precincts in the county, they were persuaded by the defendants, who influenced them in various ways, to deliver up the certificates, poll lists, and tally papers to other persons who had no authority to take charge of them, and who thus had an opportunity of opening, examining, and falsifying those documents. Mr. Justice Miller, writing the opinion of the Court, stated that counsel for the defendants conceded that Congress had the power, under the Constitution, to adopt the laws of the several States, respecting the mode of electing members of Congress, and, as resulting from that power, the right to prescribe punishment for infractions of the law so adopted; that Congress had exercised this power, and had adopted these laws, and, with them, the officers created under them, making them for the purposes of election of representatives in Congress its officers, and had added new sanctions to such laws, and subjected such officers to the penalties of these sanctions. The opinion then continued (pp 753–754):

> The main objection to the indictment, however, which is urged with great earnestness by counsel for appellants, is, that it contains no averment that the intent and purpose of the defendants' conduct was to affect in any manner the election of a member of Congress, or to influence the returns relating to that office. The proposition is put in various forms, that since there were many State and local officers also voted for at the

election in question and in those precincts, and as it is consistent with the indictment that the actions of the conspirators were directed only to the election of those persons, and not to that for the Federal office of a congressional representative, the indictment is for that reason insufficient.

The charge is that the conspirators *unlawfully and feloniously* induced the election officers to omit to perform their duty in this respect, which is in general conceded to be expressive of an evil intent. But counsel demand something more than this general evil intent in tampering with the poll lists, tally papers and certificates, although it is not denied that the object of the parties accused, in inducing the election officers to violate their duty, proceeded from a criminal intent, or that it was done for the purpose of affecting the returns contained in the papers that were withheld, or exposing them to the danger of mutilation and alteration. It is said, however, that since the evil intent is not shown to have been specifically aimed at the returns of the vote for Congressmen, the statutes of the United States can have no force so far as the infliction of any penalty is concerned: and it is asserted that Congress had no power to provide for any punishment where no intent affecting the congressional election is averred.

It would be a very singular principle to establish, that, where a man was charged with a homicide, caused by maliciously shooting into a crowd with the purpose of

killing some person against whom he bore malice, but with no intent to injure or kill the individual who was actually struck by the shot, he should be held excused because he did not intend to kill that particular person and had no malice against him.

The analogy of this example to the present case is close. The persons accused did desire and intend to interfere with the election returns, and they did purpose to falsify those returns, as to some of the persons, at least, who were then voted for as candidates. It is argued on their behalf that because it is not averred in the indictment that they intended to falsify the election returns with regard to the congressional vote, or to affect those particular returns, it is to be held bad. It is also insisted that the felonious intent had relation to the action of inducing the officers to omit the duty of keeping carefully the poll books and tally sheets, and although the records of the votes for Congressmen might possibly also suffer along with a number of other persons who might be affected by that omission, yet because there was not in the minds of the conspirators the specific intent or design to influence the congressional election, they are not to be held liable under this statute.

The object to be attained by these acts of Congress is to guard against the danger, and the opportunity, of tampering with the election returns, as well as against direct and intentional frauds upon the vote for

> members of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed or subjected in the hands of improper persons or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger might accomplish this result.

See also *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399.

Under the rule expressed in the above cases there can be no doubt that the Federal Government may use, in the performance of its functions, persons who are also engaged in performing duties for a State.

II

SOME PORTION, AT LEAST, OF THE WORK PERFORMED BY THE EMPLOYEES OF THE BUREAU OF ANIMAL INDUSTRY WAS AUTHORIZED BY THE FEDERAL STATUTES

The Federal statutes referred to on pages 10–15 above were undoubtedly an attempt by Congress to deal in a comprehensive way with the prevention of the spread of contagious, infectious, and communicable diseases of cattle, in so far as such work was within its constitutional power. For the purpose of preventing the spread of such diseases the Secretary of Agriculture was authorized and di-

rected by Section 1 of the Act of March 3, 1905, c. 1496, 33 Stat. 1264, to quarantine any State or Territory or the District of Columbia, or any portion of any State or Territory or the District of Columbia, when he should determine the fact that cattle or other livestock in such State or Territory or District of Columbia were affected with any contagious, infectious, or communicable disease. In order, however, that any such quarantine should be as little burdensome as possible, the interstate shipment of cattle from quarantined areas was not absolutely prohibited under all circumstances, but the Secretary of Agriculture was authorized and directed, by Section 3 of the Act, when the public safety would permit, to make and promulgate rules and regulations which should permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle from quarantined areas. And money to carry out the purposes of the statutes and the regulations made pursuant thereto was made available from time to time, as by the Act of May 11, 1922, making appropriations for the Department of Agriculture, which, among other things, appropriated money for "inspection and quarantine work, including all necessary expenses for * * * the inspection of southern cattle" and for "all necessary expenses for the eradication of southern cattle ticks."

The regulations of the Secretary of Agriculture, referred to on pages 18–24 above, permitted the in-

terstate shipment of cattle from a quarantined area upon certain conditions, among which were that they should have been dipped under the supervision of an inspector of the Bureau of Animal Industry, except that cattle located in areas where tick eradication was being conducted in cooperation with the State authorities, and which were on premises known by bureau inspectors to be free from ticks, might in certain cases be shipped upon inspection and certification by a bureau inspector without dipping. All shipments of inspected or dipped and certified cattle were to be accompanied by the certificate of the bureau inspector showing that the shipment was authorized under the regulations.

These regulations were clearly authorized by the Federal statutes, and the regulations as well as the statutes show a purpose on the one hand to prevent the spread of disease through interstate shipments from areas where cattle are affected with disease, and on the other to permit such shipments with as little interference as public safety will permit. It needs no argument to demonstrate that this purpose would be largely defeated if the inspection, disinfection, and certification contemplated by the statutes and provided for by the regulations were restricted to cattle actually shipped in interstate commerce or set apart or intended for such shipment. Two dippings with an interval of from 7 to 12 days between were found by the Secretary of

Agriculture to be necessary to prevent the spread of disease, except in areas where tick eradication was being conducted in cooperation with the State authorities. To delay a shipment for the time required for the dippings after the owner of cattle had set them apart for interstate shipment would often work a hardship.

There can be no doubt, therefore, that the Secretary of Agriculture was authorized to maintain inspectors in quarantined areas, if not for the purpose of compelling dipping of cattle not moving or intended to move in interstate commerce, at least for the purpose of supervising the dipping of any cattle by their owners or by State or local authorities, in order that cattle so dipped might, if the owner should so desire, be shipped in interstate commerce without further delay. Such supervision, far from imposing any burden upon the owners of cattle, would do no more than to relieve such owners from the Federal quarantine to the greatest extent consistent with preventing the spread of disease.

By the order of the Secretary of Agriculture, referred to on pages 22 and 23 above, it was determined in 1918 that splenetic fever existed in cattle in Echols County, Georgia, and that county was quarantined, and such determination was renewed and the quarantine continued from time to time until after the period referred to in the indictment. It can not be doubted, therefore, that the Secretary

of Agriculture was authorized by the Federal statutes to maintain inspectors in Echols County to supervise the dipping of cattle.

But, while it does not seem to us to be essential to a decision in this case, we think it advisable, in view of the petitioners' claim that the employees of the Bureau of Animal Industry, if engaged in the duties stated in the indictment, were engaged in "the work of usurpation of authority and of tyranny" (Brief, p. 21), to point out that the Federal statutes authorized more than mere supervision. The Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1923, c. 185, 42 Stat. 507, 511, 512, in one paragraph appropriated $529,640 for certain purposes, including inspection and quarantine work, including "all necessary expenses for * * * the inspection of southern cattle" and in another paragraph appropriated $660,000 for "all necessary expenses for the eradication of southern cattle ticks." The Act clearly contemplated affirmative action for the eradication of southern cattle ticks, as well as inspection and quarantine and supervision in connection therewith.

The Act appropriated funds for carrying out the provisions of the Act of May 29, 1884. Of the latter Act it was said in *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, at page 623:

> If any State was ready to cooperate with the Commissioner of Agriculture, then, by the third section, that officer was authorized

> to use the money appropriated by Congress in such investigations and in such disinfection and quarantine measures as were necessary "to prevent the spread of the disease from one State or Territory into another."

In *Reid* v. *Colorado*, 187 U. S. 137, a statute of Colorado providing safeguards against the introduction of diseased cattle into the State was held constitutional on the ground that the Act of 1884 did not cover the whole subject of transportation of livestock among the several states. The Court said (p. 147–148):

> Congress did not assume to declare that "the rules and regulations" which that Department [the Department of Agriculture] might adopt as necessary "for the speedy and effectual suppression and extirpation of said diseases" should have in themselves, or apart from the action of a State, any binding force upon the States. They were to be certified to the executive authority of each State, and the cooperation of such authorities in executing the act of Congress invited. If the authorities of any State adopted the plans and methods devised by the Department, or if the State authorities adopted measures of their own which the Department approved, then the money appropriated by Congress could be used in conducting the required investigations and in such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one State or

> Territory into another. Congress did not intend to override the power of the States to care for the safety of the property of their peoples by such legislation as they deemed appropriate. It did not undertake to invest any officer or agent of the Department with authority to go into a State and without its assent take charge of the work of suppressing or extirpating contagious, infectious, or communicable diseases there prevailing and which endangered the health of domestic animals.

This interpretation of the statute was approved in *Oregon-Wash. R. R. & Nav. Co.* v. *State of Washington*, decided by this Court on March 1, 1926.

The proper Federal officers were therefore authorized to use the money appropriated by the Act in disinfection work on two conditions: First, that the State should be ready to cooperate; and, second, that the measures should be such as were necessary "to prevent the spread of the disease from one State or Territory into another." Both conditions were met in this case.

The Georgia Act of August 13, 1910, provided that the State Veterinarian should "assume charge of the work of cattle-tick eradication in cooperation with the Federal authorities." The contract of June 17, 1915, between the State Veterinarian and the Federal Bureau of Animal Industry, provided that the work of tick eradication should be cooperative in every particular. The Georgia State-Wide

Tick Eradication Act approved August 17, 1918, provided for dipping of cattle " in a vat properly charged with arsenical solution, as recommended by the United States Bureau of Animal Industry." It is evident, therefore, that the Bureau of Animal Industry and the properly constituted authorities of the State of Georgia had agreed upon plans and methods for the suppression of splenetic fever and had agreed to cooperate. To hold that, as the petitioners seem to contend, more formal approval of plans and methods was necessary, would be to read into the statute a condition which is not required by its language. In *Haas* v. *Henkel*, 216 U. S. 462, and *United States* v. *Birdsall*, 233 U. S. 223, it was held that no set form is essential to the validity of a requirement or regulation of an executive department; such requirement or regulation may be in writing or established by custom.

The second condition of Section 3 of the Act of May 29, 1884, was also met. Echols County is bounded on the south by a county in the State of Florida. The Circuit Court of Appeals took judicial notice of this fact and held (R. 65) that " the supervision of cattle complained of had a direct tendency to prevent the spread of disease into another state." The petitioners complain of this, saying (p. 30 of brief):

> We call attention to the further fact that in rendering the decision complained of the Circuit Court of Appeals assumed that the

> county of Florida adjacent to Echols County was tick free, when in point of fact it was not. That Court could not take judicial cognizance of a fact which did not exist.

There is not a word in the opinion of the Circuit Court of Appeals to indicate that it assumed that the county of Florida adjacent to Echols County was tick free. That this county in Florida was not tick free did not make it unimportant to prevent the spread of disease from Georgia into Florida. Splenetic fever was present in Florida, but it does not follow that all cattle in the county of Florida adjacent to Echols County, Georgia, were infected, or that there was no necessity for preventing an increase in the disease in Florida through its spread from Echols County.

III

THE POWER OF CONGRESS TO REGULATE COMMERCE INCLUDES POWER TO QUARANTINE AREAS WHERE CONTAGIOUS DISEASES OF CATTLE EXIST, TO PROHIBIT INTERSTATE MOVEMENTS OF CATTLE FROM SUCH AREAS, AND TO AUTHORIZE THE SUPERVISION OF DIPPING OF CATTLE IN SUCH AREAS BY FEDERAL AGENTS

Neither the Federal statutes nor the regulations of the Secretary of Agriculture contain anything which can by any possibility be construed as an attempt to regulate anything but interstate commerce. They provide only for quarantining areas where contagious diseases are found to exist, and regulate only interstate movements of cattle from

such areas. That such a quarantine is within the power of the Federal Government is not, and could not be, disputed. *Reid* v. *Colorado,* 187 U. S. 137, 146–147. As has been pointed out in the preceding point of this brief, the supervision of dipping of cattle contemplated by the regulations, and actually carried on by the employees of the Bureau of Animal Industry named in the indictment, was only part of a system devised for the purpose of permitting the movement of cattle in interstate commerce from quarantined areas and at the same time protecting the public against the spread of disease.

As the Federal Government has power to prohibit absolutely interstate movements of cattle from quarantined areas, it follows that it must also have power to permit such movements only if the cattle have been dipped under Federal supervision and to provide for such supervision. Nothing in the Federal statutes or regulations in any way compelled owners of cattle in quarantined areas to have such cattle dipped under the supervision of Federal agents; only if they were not so dipped they could not be moved in interstate commerce.

That no cattle in Echols County may have been moving in, or intended for, interstate commerce at any particular time, is immaterial; the supervision of dipping of cattle in order that they might be available for interstate commerce was so related to such commerce as to be clearly within the power of the Federal Government. The quarantine and

the provision for supervision of dipping were both parts of one scheme; to prevent the interstate movement of cattle from areas where disease existed except upon such conditions as would protect the public against the spread of the disease. In *United States* v. *Ferger*, 250 U. S. 199, the validity of an Act of Congress punishing forgery and utterance of bills of lading for fictitious shipments in interstate commerce was in question. It was contended that there was and could be no commerce in a fraudulent and fictitious bill of lading, and therefore that the power of Congress could not embrace such pretended bill. In upholding the Act, Mr. Chief Justice White, delivering the opinion of the Court, said of this objection (p. 203):

> But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*In re Debs*, 158 U S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.

To like effect is *Stafford* v. *Wallace*, 258 U. S. 495, and many other cases cited therein.

The Federal Government has power to provide and protect the facilities for interstate commerce, as well as to regulate particular movements in interstate commerce, as is shown by the cases holding that Congress has power to construct or to authorize individuals or corporations to construct highways, railroads, and bridges from State to State; for example, *California* v. *Pacific Railroad Co.*, 127 U. S. 1; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525.

The present case, of course, involves no question of how far Congress may go in regulating transactions entirely within a State because of their necessary connection with interstate commerce. No regulation of intrastate transactions is involved. Supervision and inspection are not regulation. In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, in which it was held that the Interstate Commerce Commission has power to require a carrier engaged in both interstate and intrastate business to keep accounts covering all of its business in the manner prescribed by the Commission, the Court said, on page 211:

> It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commis-

> sion, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business.

In our opinion, all that is necessary in order to sustain the conviction in this case is to hold that Congress has power to authorize the supervision by Federal agents of dipping of cattle in areas quarantined by the Secretary of Agriculture. But we wish expressly to disclaim any concession that the power of Congress is limited to authorizing such supervision. We have no doubt that Congress also has power to assist a State in many ways in its efforts to eradicate contagious diseases. It is not necessary that such power should be found in any particular clause of the Constitution. In *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, in which the question was whether Congress could authorize the condemnation of land for the purpose of marking, and opening avenues along, the positions of the Armies at Gettysburg, the Court said, on pages 681, 683:

> Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. * * *
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> * * * * *
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> No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

As stated in *Massachusetts* v. *Mellon,* 262 U. S. 447, 487–488,

> * * * since the formation of the Government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.

IV

THE INDICTMENT IS VALID

The petitioners contend that the indictment is invalid because there is no allegation that any rules and regulations prepared by the Secretary of

Agriculture of the United States for the suppression and extirpation of infectious, contagious, and communicable diseases among livestock had been certified to the executive authority of the State of Georgia and accepted, or that the plans and methods adopted by the State of Georgia for that purpose had been accepted by the Secretary of Agriculture, and because there is no allegation that the cattle being dipped were the subject matter of interstate commerce or had "in any way under the law become subject to the supervision or control or power of the Secretary of Agriculture." This, of course, amounts to a contention that the indictment, in addition to alleging that the Federal employees were charged with the duty of supervising the dipping of, and causing to be dipped, cattle, in order to prevent the spread of splenetic fever among cattle, and in order to eradicate and remove from tick-infested animals what is commonly known as the cattle fever tick, should also have alleged the evidentiary facts establishing such duty.

But the rules of criminal pleading do not require an indictment to set forth the evidence, or to negative every possible theory of the defense. *Stokes* v. *United States,* 157 U. S. 187.

The indictment in this case does not charge as a substantive offense the offense made criminal by Section 62 of the Criminal Code. On the contrary, it charges only a conspiracy to commit that offense,

which is an entirely different crime. *United States* v. *Rabinowich*, 238 U. S. 78. In a charge of conspiracy the conspiracy is the gist of the crime, and certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy. *Williamson* v. *United States*, 207 U. S. 425.

In *Wolf* v. *United States* (C. C. A. 7th Circuit), 283 Fed. 885, it was held that an indictment for conspiracy to defraud the United States by evading inspection of goods manufactured under contracts for war supplies is not required to set out copies of the contracts, or to allege the authority of the officers who signed the contracts.

In *Foster* v. *United States* (C. C. A. 5th Circuit), 256 Fed. 207, one count of an indictment charged the defendant, while postmaster at Shongaloo, Louisiana, with failing or refusing to remit to or deposit in the Treasury of the United States, or a designated depository, money-order funds of the Shongaloo post office, and thereby embezzling them. Another count charged the defendant with having failed to account for or turn over to the proper officer or agent money-order funds, when required so to do by the law or the regulations of the Post Office Department, or upon demand or order of the Postmaster General, either directly or through a duly authorized officer or agent, and having thereby embezzled them. It was alleged that Shreve-

port " was then and there the designated depository of the said post office at Shongaloo, La.," and that the defendant failed to turn over funds to the post-office inspector " upon demand and order of the Postmaster General, made through the said A. C. Caldwell, post-office inspector, the said A. C. Caldwell, post-office inspector, being then and there a duly authorized officer and agent of the Postmaster General." These allegations were held good against the objection made to them that they did not say by what means the depositary was designated and the post-office inspector made the authorized agent of the department. The court said (p. 210):

> The manner in which or the means by which these things were done are matters of evidence rather than of averment. The defendant could have obtained a more particular description by demanding a bill of particulars. No prejudice could have resulted to the defendant from the alleged imperfect averment, and, if imperfect, it was cured by section 1025 of the Revised Statutes (Comp. Stat. Sec. 1691), especially when, as in this case, objection was first interposed upon the trial of the cause.

In *Ledbetter* v. *United States*, 170 U. S. 606, 612, Mr. Justice Brown, speaking for the Court, said:

> Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offence the offence may be described in the words of the statute, and it is for the defend-

ant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.

In the present case the petitioners can not possibly have been prejudiced by the fact that the indictment did not allege the evidence establishing the duty of the Federal employees and therefore can not now object to the indictment. Rev. Stat., Sec. 1025; *Connors* v. *United States,* 158 U. S. 408, 411; *Armour Packing Co.* v. *United States,* 209 U. S. 56, 84.

Moreover, even if this Court should decide that some portion of the duties of the employees of the Bureau of Animal Industry, as alleged in the indictment, was not authorized by statute, or, if so authorized, was beyond the constitutional power of Congress, the validity of the indictment would not be affected. It is familiar law that mere surplusage or unnecessary allegations will not vitiate an indictment which contains sufficient matter to charge a crime.

Grand Trunk Ry. Co. v. *United States* (C. C. A. 7th Circuit), 229 Fed. 116, 119; certiorari denied 241 U. S. 681.

Meyer v. *United States* (C. C. A. 7th Circuit), 258 Fed. 212, 215.

United States v. *Ford* (D. C. Ohio), 263 Fed. 449, 451; affirmed, *Ford* v. *United States* (C. C. A. 6th Circuit), 281 Fed. 298.

Nichamin v. *United States* (C. C. A. 6th Circuit), 263 Fed. 880, 881.

Farley v. *United States* (C. C. A. 9th Circuit), 269 Fed. 721, 724.

Friedman v. *United States,* (C. C. A. 2nd Circuit), 276 Fed. 792, 795–796.

Maresca v. *United States* (C. C. A. 2nd Circuit), 277 Fed. 727, 743; certiorari denied 257 U. S. 657.

United States v. *Drawdy* (D. C. Fla.), 288 Fed. 567, 570.

United States v. *Weiss* (D. C. Ill.), 293 Fed. 992, 995–996.

V

THERE IS NOTHING IN THE INSTRUCTIONS TO THE JURY WHICH WAS PREJUDICIAL TO THE PETITIONERS

The petitioners contend that certain instructions to the jury (R. 53–54) were erroneous. These instructions stated in effect that the employment of men by the Federal authorities, acting through the Department of Agriculture, in the enforcement of the Georgia cattle dipping law, in cooperation with the authorities of the State of Georgia, was valid, and that men so employed would be lawfully employed as employees or agents of the Federal Government.

It is not necessary to consider whether these instructions were correct. Even if they were erroneous, the substantial rights of the petitioners were not affected, and the alleged error in the instructions would not require a reversal of the judgment of the Circuit Court of Appeals. (Judi-

cial Code, Section 269, as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181.)

There is no issue as to what were the duties of the Federal employees named in the indictment, and no question that these duties included supervision of dipping of cattle. The only issue is whether these duties, or any part thereof, were lawful. On the evidence, the jury must have found that the Federal employees were engaged in supervision of dipping of cattle, as well as in assisting in the enforcement of the compulsory features of the Georgia cattle dipping law.

If this Court should decide that the Federal employees were not lawfully engaged, as such, in the enforcement of the Georgia cattle dipping law, but were lawfully engaged, as such, in supervising the dipping of cattle, the petitioners were properly convicted and were in no way prejudiced by the instructions complained of.

In *Griffith* v. *United States* (C. C. A. 7th Circuit), 261 F. 159, certiorari denied 252 U. S. 577, a prosecution for violation of the White Slave Traffic Act, a charge which permitted conviction if the jury found that the girl named was transported for " some immoral purpose " was attacked on the ground that this might include an immoral purpose other than sexual immorality. It was held that as the record showed that the immoral purpose of the interstate expedition was only that of illicit sexual intercourse, and as there was no evidence

whatever in the record of any other immorality as the purpose of the expedition, there was no prejudicial error.

In *Doremus* v. *United States* (C. C. A. 5th Circuit), 262 Fed. 849, certiorari denied 253 U. S. 487, it was held that on a trial for abetting a violation of the Harrison Narcotic Law by a druggist, an instruction erroneously authorizing a conviction, though the druggist had no actual knowledge that a prescription was wrongfully issued, was not ground for reversal, where reasonable men could have drawn but the one inference that the druggist had such actual knowledge.

In *Pounds* v. *United States* (C. C. A., 7th Circuit) 265 F. 242, the defendant had been convicted in a District Court in Illinois of feloniously having in his possession stolen property. The trial court had charged the jury, in effect, that if they believed that Albert, the defendant's brother, stole the property in Illinois, and the defendant came to Illinois and took it to Missouri, he was equally guilty with Albert. The Circuit Court of Appeals held that as an abstract proposition this charge was erroneous because it omitted the element of the defendant's knowledge that the property was stolen. The trial court had also charged the jury, however, that there could be no conviction in Illinois for the possession in Missouri of goods stolen in Illinois. The only evidence that the defendant, Andrew, had possession of the goods in Illinois was that of three witnesses, who testified

to statements made by the defendant which showed that he had taken the goods in Illinois and carried them to Missouri under circumstances which necessarily proved that he knew that they were stolen. The Circuit Court of Appeals held that the erroneous charge was therefore not prejudicial to the defendant, and affirmed the judgment of conviction, saying (page 244):

> But the only possession by Andrew of the property in this district of which there was any evidence was the possession which was testified to by these three witnesses, and it thus necessarily follows that the jury must have believed the story of these witnesses. And if they believed these witnesses, they must have believed that Andrew told them the story to which they testified, with reference to the manner in which the goods came to be in the house of himself and brother in Missouri. There is no place in the story at which a jury could have drawn a line of cleavage between the proof of his having had possession of the property in Illinois and the proof of Andrew's knowledge that it was stolen. * * * If the jury believed, as they must have believed, in order to convict, the evidence of these witnesses, they must, in the absence of any qualifying facts and circumstances, inevitably have concluded, not only that Andrew was in possession of the goods in Illinois, but that, when he came into possession of them he knew they had been stolen.

Hamilton v. *United States* (C. C. A. 4th Circuit), 268 Fed. 15, certiorari denied, 254 U. S. 645, involved a refusal by seamen to serve to the end of the voyage. The sole ground for the refusal, as stated to the master and shown by the evidence in the case, was an erroneous construction of the federal statutes relating to voyages, and imposing duties on the ship and seamen for the voyage. This position being untenable, the testimony on both sides made out an indisputable case of guilt. It was held that under these circumstances the request to charge was inapplicable, and any erroneous statement of law in the charge was immaterial.

CONCLUSION

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

WILLIAM D. MITCHELL,
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Special Assistant to the Attorney General.

APRIL, 1926.

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